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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PATRICK WILEY, Defendant and Appellant.	B171436 (Los Angeles County Super. Ct. No. BA231342)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Grimes, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, and Koryn & Koryn for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee and Erin Pitman, Deputy Attorneys General, for Plaintiff and Respondent.

Patrick Wiley appeals from the judgment entered following a jury trial in which he was convicted of murder, with further findings of firearm use and that the offense was committed for the benefit of a street gang. He contends that the trial court erred in allowing evidence that a witness was fearful and in instructing on consciousness of guilt and that his *Wheeler*[1] motion was improperly denied. We affirm.

BACKGROUND

On the evening of November 4, 2001, defendant, a member of the East Coast Crips street gang, shot Timothy Byers in the head at close range while Byers was on the sidewalk near the Dewy Hotel on Main Street in downtown Los Angeles. The principal evidence against defendant consisted of the statements of three witnesses who recanted many parts of those statements at trial, images from a security video camera showing Byers walking by the Dewy Hotel followed closely by a man wearing a hooded sweatshirt similar to the one that defendant was described as having worn, and defendant's confession, which he recanted at trial. The evidence may be summarized as follows:

The northeast corner of Main and 7th Streets is "claimed" by the East Coast Crips as a place where they conduct their "business" of selling drugs. The southeast corner is "claimed" by the rival 18th Street gang. About a month before the shooting in this case, an East Coast Crips member had been killed by members of a Hispanic gang. (18th Street is a Hispanic gang.) On the evening of November 4, defendant, Cornelius Rogers, Rogers's girlfriend, Jessica Garcia, and others were at a hamburger stand on the northeast corner of Main and 7th.

As described by Garcia in statements to the police, a notation made on her six-pack photo identification of defendant, and her preliminary hearing testimony, Crips on the east side of Main were yelling at Hispanic gang members who were on the west side

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[1] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

of Main, expressing anger at one of their friends having been shot. The Hispanic gang members started to walk away and defendant crossed the street to follow them. Defendant, who was wearing a black hooded sweatshirt, pointed a gun at one of them and fired. At trial, Garcia testified that she did not remember the part of the incident when the shooting occurred.

Rogers testified at the preliminary hearing that he saw defendant cross the street, shoot the victim, and then run away. Rogers testified at trial that he did not remember certain of his testimony from the preliminary hearing, that he thought the preliminary hearing transcript had been tampered with, and that, before his appearance at the preliminary hearing, he was threatened by the police if he did not tell them what they wanted to hear.

Andre Walker told police that he was in the area shooting dice on the night of the incident. He saw East Coast Crips members, including defendant, speaking with a Hispanic male (Byers) who had come across the street to where the Crips were standing to use the public telephone. Byers did not speak English, and Walker walked with him back across the street. Defendant, who was wearing a black hooded sweatshirt, then ran across the street and shot Byers. Walker testified at trial that he had identified defendant under pressure from a police officer and had not actually seen any part of the incident.

Following his arrest, defendant made a statement to the police. In it, defendant initially denied having a gun. He next stated that he got a gun from someone whose name he did not know but then again denied having the gun and also denied being the person on the hotel security surveillance camera. As the statement progressed and defendant was confronted with some of the evidence against him, he ultimately confessed to shooting the victim.

Testifying in his own behalf at trial, defendant denied any knowledge of the crime. He asserted his confession had been coerced by the police having sprayed him with mace and then having interrogated him for three to five hours, promising him that he would have to serve only ten years in prison if he confessed.

DISCUSSION

1. Evidence That Witness Fearful

Witness Jessica Garcia initially failed to respond to a subpoena to appear at trial. A body attachment issued, following which Garcia appeared and gave testimony in which she recanted previous statements, claiming she did not remember any details of the shooting or having identified defendant. A hearing was then held under Evidence Code section 402 to determine whether the prosecutor could impeach Garcia with her preliminary hearing testimony. At the hearing Garcia testified that she was concerned for her safety, that people now knew what she looked like (relatives of defendant's were in the courtroom) and could find her address, and that she could be hurt. She also asserted her trial testimony was true in stating that she did not remember details of the shooting. The trial court ruled that the prosecutor could impeach Garcia with her preliminary hearing testimony.

Garcia then resumed testifying before the jury and was impeached with her preliminary hearing testimony. As Garcia's testimony continued, the prosecutor asked if she had any fear about testifying. Garcia responded that she just wanted to go home, following which counsel approached the bench. Defense counsel requested that the jury be told that defendant himself had not made any threats or done anything to intimidate Garcia. In response, the court told the jury: "I'm going to permit the deputy district attorney to question Ms. Garcia about her fear simply so that you may consider her testimony, if you wish to do so, as reflecting upon her state of mind. I am not admitting it so that you may infer that the defendant has done anything to make her fearful. Do you understand that? It is only relevant to her state of mind, not as a reflection upon the defendant's conduct."

Once the admonition had been given, the direct examination of Garcia continued as follows:

"[The Prosecutor:] All right. Now — and so, ma'am, let me ask you again. Do you have any fear as you testify today and as you testified yesterday?

"[Ms. Garcia:] I have some fear, but I mean —

"[The Prosecutor:] Fear of what?

"[Defense Counsel]: Objection. Relevance.

"The Court: Ms. Garcia, just tell the jury what you told us here earlier this morning.

"[Ms. Garcia]: Because I just — I don't know who those people are in the courtroom, and now they know what I look like. They can come and try to harm me or my baby or something. I don't know.

"[Defense Counsel]: Objection, Your Honor. I would ask that the Court strike this.

"The Court: I'm not striking it. Again, it is only permitted to show her state of mind, not to show the truth that there is any basis for her fear from anyone.

"[The Prosecutor]: . . . [¶] . . . [¶] . . . Did you have fear yesterday when you were testifying?

"[Ms. Garcia:] Yes.

"[The Prosecutor:] And the reason you didn't come to court, was that also because you were afraid?

"[Defense Counsel]: Objection. Leading.

"The Court: Overruled.

"[Ms. Garcia]: Yes.

"[The Prosecutor]: Now, today you indicated that you had some fear that people in the audience know what you look like. [¶] How about yesterday and the time you didn't come to court, what was that fear based on?

"[Ms. Garcia:] Because I — I — I didn't want to come to court. I mean, I was scared. I mean —

"[The Prosecutor:] Scared of what?

"[Ms. Garcia:] Ain't nobody going to protect me or my daughter if something happens. Like if something happens to me or my daughter, you're going to be at home sleeping in your bed while me and my daughter being harmed or something. You know?

"[Defense Counsel]: Objection. Relevance.

"The Court: Overruled."

Defendant contends "the court abused its discretion under Evidence Code section 352 as the probative value of the 'fear' evidence was far outweighed by its prejudicial effect." Assuming that the record justifies consideration of this argument although defendant failed to object on section 352 grounds, we disagree.

"'Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible. [Citation.]' [Citation.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; see *People v. Burgener* (2003) 29 Cal.4th 833, 869.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "A trial court's exercise of discretion under Evidence Code section 352 will not be reversed unless it 'exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Tran* (1996) 47 Cal.App.4th 759, 771.) "In most instances the appellate courts will uphold the exercise of discretion even if another court might have ruled otherwise. [Citation.]" (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1092.)

Given the compelling inference that Garcia's claim of not remembering the details of the shooting was based on fear coupled with the trial court's express admonition that no inference should be drawn that defendant had done anything to make Garcia fearful, the potential for *undue* prejudice emanating from evidence of Garcia's fearfulness was minuscule. Thus, as in *People v. Olguin*, *supra*, 31 Cal.App.4th at page 1369, "[t]he trial court acted well within its discretion in insuring the jury would have such evidence and would properly evaluate it."

2. Instruction on Consciousness of Guilt

Defendant contends the trial court prejudicially erred in instructing pursuant to CALJIC No. 2.03[2] on consciousness of guilt because, even though he initially denied culpability in his statement to the police, he later gave a complete confession to the crime. We disagree.

An argument identical to defendant's was rejected by our Supreme Court in *People v. Nicolaus* (1991) 54 Cal.3d 551, 578–579. (See also *People v. Kelly* (1992) 1 Cal.4th 495, 531.) Earlier, in *People v. Mattson* (1990) 50 Cal.3d 826, 872, the Supreme Court had reasoned that an inference of consciousness of guilt from an initial denial followed by a confession was "tenuous," but concluded it was "not reasonably probable that a different verdict would have been reached absent the error, if it was error. The impact of an inference of consciousness of guilt could not have resulted in a miscarriage of justice. [Citation.]" (*Ibid*.) Similarly in this case, assuming the instruction should not have been given, defendant suffered no prejudice. Accordingly, his argument must be rejected.

3. *Wheeler* Issue

Defendant, who is African-American, contends that the trial court erred in denying the *Wheeler* motion he made following the prosecutor's exercise of peremptory challenges of two African-American prospective jurors, identified as Nos. 2547 and 0339. We disagree.

Prospective Juror No. 2547 was a self-employed truck driver who was divorced and lived in Alhambra. He had no prior jury experience. Following an explanation by the court that this was not a capital case, the prospective juror stated: "That's a little too

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[2] CALJIC No. 2.03 provides: "If you find that before this trial [the] defendant made a willfully false or deliberately misleading statement concerning the crime for which [he] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

rough for me. I ain't never dealt with no murders. Another case, I would be happy." He had never been a gang member, adding, "but I always lived right around L.A. so almost everybody I dealt with was in a gang, elementary, junior high school." The prospective juror stated that he was not biased based on his familiarity with gang activities. He had cousins who had been in trouble with the law but thought they had been treated fairly. He also had cousins who are police officers in southern states. When asked whether he talked to them about their work, the prospective juror responded, "No, not really. I just want to know about the radar detector." The court stated, "But they wouldn't tell you anything, would they?" and the prospective juror responded, "No."

The voir dire continued, focusing on the charges against defendant. Prospective Juror No. 2547 stated, "I don't like talking about murder and being here six days talking about murder and looking at pictures. That's not something I do with my life. I don't talk about murder." Asked if that feeling would prevent him from paying careful attention, the prospective juror explained, "I think a little bit. [¶] . . . [¶] . . . I don't think I would be totally focused because that's not stuff I like to talk about." He also responded in the affirmative to whether he felt this bias would prevent him from giving his full attention to the trial.

Prospective Juror No. 0339 was single, unemployed, lived in Hollywood, and had no prior jury experience. When asked whether there was anything that should be brought to the court's attention, the prospective juror replied: "A number of my family members own handguns. My God father, he owns a hunting riffle [*sic*]. I have family members that are in gangs. Throughout my childhood, a number of my acquaintances were in gangs, from Inglewood, 18th Street, Grape Street, Roller 60's. I've had both good and bad encounters with peace officers. I think that's pretty much it." He did not think these experiences would interfere with his ability to be fair.

Following the prosecutor's exercise of a peremptory challenge on Prospective Juror No. 0339 (Prospective Juror No. 2547 had previously been excused on a prosecution peremptory challenge), defendant objected under *Wheeler*. The court stated

that it was "certainly not going to grant a Wheeler motion." It then added, "Do you want to make your record?"

The prosecutor responded by reviewing his challenges to various non-African-American prospective jurors. He continued: "The two Black jurors, one was 2547. He was a truck driver who had cousins who got in trouble. He said he knew gang members all his life. He also has a job that is kind of a loner-type job. He's a truck driver so he's out on the road all the time and that culture, they don't like the police. In fact, he makes some disparaging comments about radar detectors. [¶] 0339, which was the last challenge is single. He's unemployed and he's young to start with. Secondly, he indicated that while he had some positive experiences with police, he also had some bad encounters with police. He also indicated he's known lots of gang members throughout his life. This isn't even close, quite frankly, Your Honor." The court denied the motion.

The use of peremptory challenges to remove potential jurors on the basis of a group bias, such as race, is not permitted. (*People v. Wheeler*, *supra*, 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712].) Citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1196, defendant asserts that, in asking the prosecutor whether he wanted to make a record, the trial court impliedly found that a prima facie case of systematic exclusion had been made. The Attorney General disagrees about the existence of an implied finding. We need not resolve this issue.

Regardless of whether an implied finding was made, the prosecutor stated for the record his reasons for challenging the two African-American prospective jurors. "*Wheeler* does not require the trial court to conduct further inquiry into the prosecutor's race-neutral explanations if . . . it is satisfied from its observations that any or all of them are proper. [Citation.]" (*People v. Jackson*, *supra*, 19 Cal.4th at p. 1198.) Here, although the prosecutor did not specifically mention Prospective Juror No. 2547's expressed reluctance to serve on a murder jury and acknowledgment that sitting on such a jury would prevent him from paying full attention to the trial, the prosecutor did refer to the prospective juror's familiarity with gang members and cousins who had been in trouble and the anti-police culture that the prosecutor attributed to defendant's

occupation. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 924–925 [occupation may provide race-neutral basis for peremptory challenge].)[3] And the negative experience with law enforcement that the prosecutor stated as a reason for challenging Prospective Juror No. 0339 (in addition to his being acquainted with members various gangs, including 18th Street) is well recognized as a valid basis for peremptory challenge. (See *People v. Turner* (1994) 8 Cal.4th 137, 171.) Accordingly, defendant's contention of *Wheeler* error must be rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

I concur:

SPENCER, P. J.

I concur in the judgment only.

VOGEL, J.

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[3] We observe that in support of its argument on this point respondent cites *People v. Hayes* (1996) 44 Cal.App.4th 1238, 1245. On July 31, 1996, the Supreme Court ordered the *Hayes* opinion to be depublished.